IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-482

JOHN BRAINARD CONKLIN and
JULIETTE DURAND PERRY,
Petitioners,

v.

STATE OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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The Petitioners, John Brainard Conklin and Juliette Durand Perry, pray that a Writ of Certiorari issue to review the judgment of the Court of Special Appeals of Maryland, entered in this case on April 19, 1977.

ORDERS AND OPINIONS BELOW

The order of the Court of Appeals of Maryland was entered on June 29, 1977 and was unreported. (Appendix A, A. 1) The opinion of the Court of Special Appeals of Maryland was unreported. (Appendix B, A. 2) The Circuit Court for Caroline County, Maryland, filed an unreported opinion on May 7, 1976. (Appendix C, A.)

JURISDICTION

The judgment of the Court of Special Appeals of Maryland now sought to be reviewed was entered on April 19, 1977. The jurisdiction of this Court is predicated upon 28 United States Code 1257 (3).

QUESTION PRESENTED FOR REVIEW

Whether or not the Fourth Amendment to the United States Constitution applies in an open field?

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On September 23, 1975 two search and seizure warrants were executed upon the property of the Petitioners, John Brainard Conklin and Juliette Durand Perry, and, as a result of the evidence seized, the Petitioners were charged with five (5) counts of possession of a controlled dangerous substance in violation of Article 27, Section 287 (a) of the Annotated Code of Maryland, two (2) counts of possession of a controlled dangerous substance in sufficient quantity to indicate an intent to distribute in violation of Article 27, Section 286 (a) (1) of the Annotated Code of Maryland, one (1) count of manufacturing a controlled dangerous substance in violation of Article 27, Section 286 (a) (1) of the Annotated Code of Maryland, and one (1) count of maintaining a common nuisance in violation of Article 27, Section 286 (a) (5) of the Annotated Code of Maryland. On November 21, 1975 in accordance with Rule 729 (Search or Seizure), Maryland Rules of Procedure, Annotated Code of Maryland, the Petitioners timely filed in the Circuit Court for Caroline County a pre-trial Motion to Suppress and Exclude the Evidence that had been seized pursuant to the search and seizure warrants. On that same day a hearing was held before the Honorable Harry E. Clark, Associate Judge of the Second Judicial Circuit of Maryland, who denied the motion as to the first warrant but granted the motion as to the second warrant. On November 24, 1975 Judge Harry E. Clark granted Petitioners' Motion for Removal and ordered the case transferred to the Circuit Court for Kent County, Maryland.

On January 19, 1977 in the Circuit Court for Kent County a second hearing was held on the Motion to Suppress and Exclude the Evidence seized pursuant to the

first warrant and Judge Harry E. Clark again denied the motion. Trial by jury commenced that same day and was concluded on January 21, 1976. Both Petitioners were found guilty of possession of marijuana in sufficient quantity to indicate an intent to distribute and, in addition, Petitioner, John Brainard Conklin, was found guilty of manufacturing marijuana. On March 10, 1967, Judge Harry E. Clark ordered Petitioner Juliette Durand Perry committed to the Caroline County Jail to serve a ninety (90) day sentence and Petitioner John Brainard Conklin committed to the Department of Correction to serve two consecutive two (2) year sentences. On May 7, 1977 Judge Harry E. Clark filed in support of his ruling with respect to evidence seized pursuant to the first warrant an opinion wherein he held that the Fourth Amendment to the United States Constitution does not extend to a garden growing in an open field. (Appendix C, A. 14).

Notices of appeal were timely filed and on October 18, 1976 argument was held before the Court of Special Appeals of Maryland. On April 19, 1977 the Court of Special Appeals filed a per curiam opinion affirming the judgment of the trial court. On May 10, 1977 pursuant to Rule 1050 a, Maryland Rules of Procedure, Annotated Code of Maryland, Petitioners filed a Motion for Reconsideration of Decision. On May 18, 1977 the Court of Special Appeals denied the motion and on May 19, 1977 issued its mandate. On May 26, 1977 a Petition for a Writ of Certiorari to the Court of Special Appeals was filed in the Court of Appeals of Maryland by Petitioners. On June 29, 1977 the Court of Appeals issued an order denying the Petition for a Writ of Certiorari.

STATEMENT OF FACTS

Joseph Gitta, Sr. owned with his wife, Maria, as tenants by the entireties, a seven and one-half acre farm in Caroline County, Maryland. The farm was divided into two parcels, one containing the residence of the Gittas and their two sons, and the other outbuildings and a two-story barn. In the spring of 1975 due to both his friendship with Petitioner John Brainard Conklin and Conklin's help on a number of tasks concerning the Gitta farm, Mr. Gitta gave exclusive use of the back part of his property (approximately three and one-half acres) to Mr. Conklin. Mr. Conklin cleared a garden approximately twenty feet by thirty feet on his half of the property. Around this garden he erected two fences approximately six feet apart. The inner fence was five feet high made of American wire while the outer fence was three and one-half feet high made of barbed wire. Appellant Conklin did not live on the property but rather resided in a house trailer with Petitioner Juliette Durand Perry several miles from the property.

In November of 1974, Jozsef Gitta (one of Mr. Gitta's two sons) began working as a cadet for the Easton County (Maryland) Police Department. [The Court of Special Appeals of Maryland assumed without deciding that Jozsef's position was comparable to that of a police officer.] (Appendix A, A. 3) On several occasions Mr. Gitta, Sr. admonished his son not to venture back to Mr. Conklin's half of the property. However, Gitta's son went back to Conklin's land, entered the garden and seized a leaf he suspected to be marijuana. He took this leaf to his superior at the Easton Police Department. Additionally, he obtained information concerning Petitioner Conklin's car registration number from the D.C. Motor Vehicle Administration. The

following day he went back onto Mr. Conklin's one-half of the property and entered the barn located there, and observed suspected marijuana. He informed his superior of his discovery and agreed to take Maryland State Police Officer Edwin David Horner to the barn. Subsequent to a search of the barn on September 22, 1975, Officer Horner used his observations to obtain two search and seizure warrants, one for the barn and the other for Petitioners' trailer home. On September 23, 1975, Maryland State Police Officers entered the barn and the trailer, executed the warrants, arrested Petitioners and seized the marijuana.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

The taking of a leaf from a marijuana plant growing inside a cultivated, wire-enclosed garden situated in an open field led to the issuance of search and seizure warrants for Petitioners' property. Upon execution of these warrants, contraband was seized that culminated in the instant convictions. Petitioners claim the initial taking constituted an illegal governmental intrusion into an area they consciously sought "to preserve as private", *Katz v. United States*, 389 U.S. 347, 351 (1967), and the "fruits" of such an illegality – the seized contraband – should have been suppressed at their trial. *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963).

Both the trial court and the Court of Special Appeals of Maryland rejected Petitoners' claim under the authority of *Hester v. United States*, 265 U.S. 57, 59 (1924) that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects', is not extended to the open fields." Therefore, whether or

not the Fourth Amendment applies in open fields is the question and one that has resulted in considerable diversity of opinion in the federal courts of appeal. When a question as fundamental as the application of a constitutional amendment creates such patent conflict, the need for Supreme Court guidance is warranted.

Until the advent of *Katz*, the 'open fields' doctrine of *Hester* was unassailable. However, when in 1967 Justice Potter Stewart wrote that "the Fourth Amendment protects people, not places . . . ", *Katz*, 351, the solidarity among the circuits began to crumble.

In only two circuits has the doctrine first enunciated in *Hester* remained unblemished by those seven words. The principle of Fourth Amendment inapplicability in open fields remains unchanged in the Eighth Circuit, *McDowell v. United States*, 383 F.2d 599 (8th Cir. 1967), *State v. Schrader*, 196 Neb. 632 (1976), and the Sixth, *United States v. Whitmore*, 345 F.2d 28 (6th Cir. 1965), *United States v. Hartsell*, 294 F. Supp. 414 (1968).

In the Fifth Circuit, the doctrine appears to have lost ground through the addition of a requirement of inadvertence. In *United States v. Holmes*, 521 F.2d 859, 869 (5th Cir. 1975), rehearing granted 525 F.2d 1364 (1976), affirmed 537 F.2d 227 (1976), where the questioned search was the warrantless peering into a shed located on private property, the Court of Appeals for the Fifth Circuit held that *Hester* does not condone governmental trespasses "solely to secure evidence of crime". Furthermore, the Court expressed its belief that "a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that government agents will be crawling through the underbrush . . . " *Holmes*, 870.

In both the Second and Third Circuits, a retreat from the holding in *Hester* has only been recently suggested in the state appellate courts. In *People v. Abruzzi*, 52 A.D. 2d 499 (1976), the Supreme Court of New York (the second highest court in that state) had to rule on the constitutionality of a police officer climbing a ladder and peering into a doctor's examination room. Both the affirming and dissenting judge spoke of the doctor's reasonable expectation of privacy. Additionally, Judge James D. Hopkins (in dissent) noted that the open fields principle of *Hester* "does not appear viable after *Katz v. United States* . . . ". *Abruzzi*, 99, fn. 1. Within the Third Circuit, Pennsylvania's second highest court – the Superior Court of Pennsylvania – confronted a factual scenario similar to the case at bar and upheld the 'search' under *Hester's* 'open fields' doctrine. *Commonwealth v. Janek*, Pa. Super, 363 A.2d 1299 (1976). However, the Court went on to say, "Even if we were to conclude that *Hester* is distinguishable from the case before us, or that it no longer has legal validity in light of *Katz v. United States* . . . (the conclusion drawn by the lower court in granting Appellee's suppression motion), we find that the police were on the property with . . . consent . . . ". *Commonwealth v. Janek*, 1300-01. Dissenting Judge J. Sydney Hoffman found no consent and followed the reasoning of the Fifth Circuit in *United States v. Holmes, supra*, in holding that the field, which was surrounded by wire, was "not an open one, inviting casual intrusion . . . " and that "[t]he police incursion was not happenstance." *Janek*, 1303. He concluded that Appellee "had preserved his Fourth Amendment rights". *Janek*, 1305.

Both the Tenth and Fourth Circuits, although still steadfastly supportive of *Hester*, have left open the question of the applicability of *Katz* to open fields. In *Fullbright v.*

United States, 392 F.2d 432 (10th Cir. 1968), government agents stood on Appellant's property (outside the curtilage) and with binoculars observed him conducting illicit transactions in his shed. The Court upheld the agents' actions but commented, " . . . we do not mean to say that surveillance from outside a curtilage under no circumstances could constitute an illegal search in view of the teachings of *Katz v. United States* . . . however, . . . on the record before us in light of *Hester* the observations in question may not be deemed an unreasonable search . . . ". *Fullbright v. United States*, 435. The Fourth Circuit reaches the same conclusion in *Patler v. Slayton*, 503 F.2d 472 (4th Cir. 1974). Factually, "[s]pent bullets and shell casings matching the murder weapon were seized from the pasture of a farm owned by Patler's father-in-law . . . ". *Patler v. Slayton*, 477. *Patler* used the pasture for target shooting. Like the Tenth Circuit, the Court found that, in light of *Hester*, there was no reasonable expectation of privacy in the pasture.

It is worth noting that even in a bastion of support for *Hester* as the Fourth Circuit, the late Judge William J. O'Donnell, speaking for the highest court in Maryland, stated that "[t]he Supreme Court, . . . , no longer seems to speak concerning the 'curtilage' as opposed to 'an open field' . . . " and suggested that "[e]volving from the holdings in *Katz* is a protection within the Fourth Amendment of an area within which 'one has a legitimate expectation of privacy' . . . ". *Everhart v. State*, 274 Md. 459, 485-86 (1975).

In the Ninth Circuit, the impact of *Katz* was immediate and lasting. In 1968, the year following *Katz*, the Court of Appeals for the Ninth Circuit commented that if the constitutionality of a search turned "upon the degree of

privacy a resident is seeking to preserve as shown by the facts of the particular case, . . . attention will be more effectively focused on the basic interest which the Fourth Amendment was designed to protect." *Wattenburg v. United States,* 388 F.2d 853, 858 (9th Cir. 1968). In 1972, the Court made no mention of *Hester* and its 'open fields' doctrine in its decision on whether there was a "justified expectation of privacy" in a camping site situated in an open field immediately adjacent to a highway. *United States v. Pruitt,* 464 F.2d 494, 496 (9th Cir. 1972). Most recently, the Court concluded that "[i]t now appears that *Hester* no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy." *United States v. Freie,* 545 F.2d 1217, 1223 (9th Cir. 1976).

The three remaining circuits – the first, seventh, and eleventh – have not had the opportunity to directly confront an open fields scenario since the advent of *Katz.* However, the acceptance of the philosophy of *Katz* that 'the Fourth Amendment protects people not places' and its concommitant eroding of property distinctions is evident. *United States v. Cruz Pagan,* 537 F.2d 554 (1st Cir. 1976); *United States Ex Rel. Saiken v. Bensinger,* 489 F.2d 865 (7th Cir. 1973), cert. denied in 417 U.S. 910 (1974); *United States v. Boswell,* D.C. App, 347 A.2d 270 (1975).

Thus, it appears that there is a genuine diversity of judicial opinion over the applicability of the Fourth Amendment in open fields. Only two circuits, the Eighth and Sixth, firmly follow the ruling of *Hester* that the Fourth Amendment does not apply. One circuit, the Fifth, requires the element of inadvertence before determining Fourth Amendment inapplicability. The First, Second, Third,

Seventh and Eleventh Circuits speak of *Katz'* reasonable expectation of privacy and raise doubts as to the continuing viability of *Hester.* Even the Tenth and the Fourth Circuits, bastions of support for the 'open fields' doctrine, no longer speak of Fourth Amendment inapplicability but rather reasonable expectations of privacy in light of *Hester.* Finally, the Ninth Circuit in fully applying *Katz'* words that 'the Fourth Amendment protects people, not places' to *Hester's* 'open fields' doctrine concludes that "*Hester* no longer has any independent meaning." *United States v. Freie, supra.*

Consequently, guidance from the Supreme Court is warranted. It is no solution to cite *Air Pollution Variance Board v. Western Alfalfa,* 416 U.S. 861 (1974), as support for *Hester.* For the government inspector in *Air Pollution Variance Board v. Western Alfalfa,* 865, "had sighted what anyone in the city who was near the plant could see in the sky – plumes of smoke". Therefore, there could be no reasonable expectation of privacy and even under *Katz,* the governmental intrusion was not unreasonable. Moreover, this Court's recent abandonment of the common law of property in favor of *Katz'* expectation of privacy in determining the legality of an arrest in the doorway of a house, *United States v. Santana,* 427 U.S. 38, 42 (1976), raises questions as to the continued vitality of a doctrine predicated upon the ancient common law distinction between a house and an open field. *Hester v. United States, supra,* 59.

CONCLUSION

Patently, since there is genuine diversity of opinion throughout the courts of appeal with respect to the applicability of the Fourth Amendment in open fields, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GERALD A. KROOP,
Attorney for Petitioners.

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

JOHN BRAINARD CONKLIN and
JULIETTE DURAND PERRY

v.

STATE OF MARYLAND

Petition Docket No. 123
September Term, 1977
(No. 257, September Term, 1976
Court of Special Appeals)

ORDER

June 29, 1977

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the said petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

APPENDIX B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 257

September Term, 1976

JOHN BRAINARD CONKLIN and JULIETTE DURAND PERRY

v.

STATE OF MARYLAND

Davidson, Moore, Melvin, JJ.

Per Curiam

Filed: April 19, 1977

In the Circuit Court for Kent County, a jury, presided over by Judge Harry E. Clark, found the appellant, John Brainard Conklin, guilty of unlawful manufacture of marijuana, and possession of marijuana in sufficient quantity to indicate an intent to distribute that controlled dangerous substance. It found the appellant, Juliette Durand Perry, guilty of possession of marijuana in sufficient quantity to

indicate an intent to distribute. On appeal, both contend that the trial court erred in denying a motion to suppress evidence obtained as a result of an illegal search and seizure. Appellant Perry additionally contends that the evidence was insufficient to sustain her conviction.

The answers to the appellants' contentions are as follows:

1. The protection of the fourth amendment to people in their "persons, houses, papers and effects," does not extend to open fields. *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974); *Hester v. United States*, 265 U.S. 57, 59 (1924). See also *Brown v. State*, 15 Md. App. 584, 605 (1972). Here, a leaf of marijuana growing in an open field enclosed by a set of wire fences was seized before a warrant was obtained.[1] The field was located more than 200 feet away from the owner's residence and had not been used by the owner or his family for a number of years. Thus, the open field was not a part of the curtilage. *United States v. Swann*, 377 F. Supp. 1305, 1306-07 (D. Md. 1974). Because the marijuana seized was growing in a constitutionally unprotected area, no search warrant was necessary.

2. Consent to a warrantless search by a person who has joint control, access or use of a premises is valid against an absent, nonconsenting person who shares common authority over the premises. *United States v. Matlock*, 415 U.S. 164, 169 (1974); *Tate and Hall v. State*, 32 Md. App. 613, 619 (1976); *Streat v. State*, 11 Md. App. 543, 546, cert. denied, 262 Md. 750 (1971). Here, there was conflicting evidence as to the degree of appellants' control, access or use of a barn searched by a police officer,

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[1] We have assumed without deciding that the person who seized the marijuana leaf was a police officer.

accompanied by the son of one of the owners of the property, before a warrant had been obtained. One of the owners of the property, Mr. Gitta, Sr., testified that he had given the appellant Conklin the exclusive use of the barn, and had either given or intended to give the appellant Perry the same right. A police officer testified that Mr. Gitta, Sr., told him that the appellant had "access to a plot of land which he was using for a garden, and didn't have any right to use the barn or other property around it." The owner's adult son testified that before the appellants were given permission to garden he had, on various occasions, walked through the barn. He also testified that his father never prohibited him from going anywhere on the property. Upon our independent appraisal of the record, we are persuaded, as was the trial judge, that the appellants did not have an exclusive right to use the barn. At best, they, along with the owners, their sons, and their invitees, had joint control over, access to, and use of the barn. Under these circumstances, the son's consent to a police officer's warrantless search was valid as to the appellants. The protection of the fourth amendment was waived.

3. In determining when there is joint possession of a controlled dangerous substance the factors to be considered are: 1) proximity between the defendant and the contraband; 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant; 3) ownership or some possessory right in the premises in which the contraband is found; or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband. *Nutt v. State*, 16 Md. App. 695, 706, *cert. denied*, 269 Md. 764 (1973); *Folk v. State*, 11 Md. App. 508, 518 (1971). Here, the appellant Perry was apprehended in the barn in which large quantities of marijuana were present. Proximity could not be more clearly established. The marijuana was in plain view. There was some evidence to show that the owner either gave the appellant Perry permission to use the barn,

or intended to give her permission so that she was legitimately on the premises. Thus, while there was no evidence to show that she had a "possessory" interest in the premises, there was at least some evidence to show that she had some authority over it. Finally, there was evidence to show that when she entered the barn, in the company of the appellant, her then lover, he felt the marijuana and stated, "It's time to work, work, work." Appellant Perry walked toward a screen upon which marijuana leaves were drying. She asked appellant Conklin if "he knew where any more buckets were so she could use it for a seat." She then continued walking toward the screen and sat down on the floor about one foot away from it. The presence of these circumstances supports a reasonable inference that appellant Perry was about to go to work processing the marijuana drying on the screen, thus, participating with appellant Conklin in the mutual use of the contraband. The evidence was sufficient to sustain her conviction. *Williams and McClelland v. State*, 5 Md. App. 450, 458 (1968), *cert. denied*, 252 Md. 731, 734 (1969).

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANTS.

APPENDIX C

IN THE CIRCUIT COURT FOR CAROLINE COUNTY

STATE OF MARYLAND

v.

JOHN BRAINARD CONKLIN
JULIETTE DURAND PERRY

Criminals Nos. 957 & 958

MEMORANDUM OPINION ON RULING DENYING MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF A SEARCH AND SEIZURE CONDUCTED ON THE GITTA PROPERTY

Two hearings were held on the Defendants' Motion to Suppress. The first was held on 21 November 1975 in the Circuit Court for Caroline County at Denton, Maryland, and the second was held on 19 January 1976 in the Circuit Court for Kent County at Chestertown, Maryland. After each hearing, the Motion to Suppress the Search and Seizure Warrant and all evidence obtained thereunder was overruled.

FACTS

The scene of the crimes charged in these cases was the 7.5 acre chicken farm titled to Joseph and Maria Gitta as tenants by the entireties located almost adjacent to the corporate limits to the Town of Denton in Caroline County, Maryland. This 7.5 acre spread was divided into two parcels of approximately equal size. One parcel contained the residence in which Mr. and Mrs. Gitta lived with two of their children – namely: Jozsef Gitta, Jr., an adult, and his younger brother Peter Gitta, who was 13 years old last

year. Also located on this parcel was a shop and several other outbuildings used in connection with Mr. Gitta's auto repair business and his other activities including that of gardening and bee keeping. It does not appear from the record whether Mr. Gitta, Sr. was engaged in gardening and bee keeping as an avocation and purely for home consumption or as a commercial enterprise, nor is it clear whether this parcel was completely fenced on all sides.

The other parcel contained three brooder houses, a two-story barn and other outbuildings. This parcel was completely enclosed by the brooder houses and a shed and fencing in between these buildings. The fencing consists of a combination of barbed wire, American wire and electric fences and was used to contain Mr. Gitta's goats. The gates to these fences did not have locks and there were no "NO TRESPASSING" signs posted anywhere on the property. As Mr. Gitta had not raised any chickens or used this parcel for any purpose other than to pasture his goats for several years, the buildings located thereon were in somewhat of a dilapidated state and the land not occupied by the buildings was given over to such weeds and bushes as had escaped the attention of the goats. The barn is located a little bit to the rear of the middle of this parcel and is 456 feet from the residence on the other parcel.

The Defendants Conklin and Perry have for the past three years occupied a trailer in a rural setting about three miles North of the Town of Denton and at least that far from the Gitta farm. At the time of his arrest, the Defendant Conklin was unemployed except for doing the usual household chores and the Defendant Perry taught handicapped children in Talbot County, Maryland, under a contract with the Talbot County School Board.

Mr. Conklin met Mr. Gitta, Sr. sometime during January of 1975 when he stopped by his home to find out if he could tell him where he might rent a woodlot from which to cut some fire wood. Conklin and Gitta found they

had a lot in common and soon became fast friends and it was not uncommon for Conklin to visit Gitta several times a week. During these visits, Conklin sometimes helped Gitta with his chores and became quite interested in his bee keeping operation, so much so that he bought some bees from Gitta and started a modest bee keeping operation on his premises.

When it became time for Gitta to put in his vegetable garden, Conklin helped him. One day while they were working in the garden, Gitta asked Conklin why he hadn't put a garden in for himself. Conklin replied that he didn't have the space; whereupon, Gitta told him that he wasn't using his back lot except for a goat pasture and that he could put his garden in there. Conklin thanked him and soon thereafter cleared a 20 foot by 30 foot plot between the barn and one of the brooder houses and fenced it in with wire and fence posts furnished by Gitta. Actually, he fenced it in with two fences to keep the goats out. The inner fence, which stood five feet high was a 6 inch by 6 inch American wire fence, and the outer fence, which was six or seven feet distant from the inner fence and stood about three high, consisted of three strands of barbed wire spaced about a foot apart. The inner fence had a gate made out of one of the doors to one of the brooder houses. The gate was not equipped with a lock but held shut with a piece of wire. The outer fence had no gate and there were no "NO TRESPASSING" signs posted anywhere in the vicinity of this garden.

After the plot had been cleared and fenced, Conklin planted a few rows of corn and tomatoes under the direction of Gitta and, later on, a lot of marijuana. Conklin testified that the goats ate all of his corn and some of his marijuana.

According to the undisputed testimony, Gitta gave Conklin and Perry the use of this plot of land for a vegetable garden and permitted them to pass over any part

of the back lot to get to and from the garden. No written or oral lease was ever contemplated or consummated by and between the parties to this transaction. It was simply an oral permit or license given by Gitta to the Defendants for the purpose hereinbefore mentioned, which it was understood Gitta could terminate without notice at any time he chose.

Gitta said he did it out of friendship and in the hope that by having someone back there frequently some of the vandalism he had suffered in the past would be prevented and that the Defendants' activities back there would help keep the weeds down. There is nothing in the record to indicate that the Defendants ever cut down any weeds except where they established their garden. Also, it is difficult to understand how their presence in the garden in the daytime would deter vandals who usually operate at night. In any event, no money or other consideration passed from the Defendants to Gitta for the use of his land.

In November 1974, Jozsef Gitta, Jr. started working for the Easton Police Department, which exercises police power within the corporate limits of Easton and in an area within a one mile radius thereof. Easton is approximately eighteen miles from the Gitta farm. Young Gitta was employed by the Department as a clerk-cadet at all times pertinent to this case and is now serving as a security guard at some plant in Delaware. At no time was he ever a member of the police force or clothed with investigatory or arrest powers. His position was strictly clerical. Furthermore, Jozsef was never at any time requested or authorized by any law enforcement agency to initiate or conduct the investigation on his family's property which we are about to relate.

In June of 1975, Jozsef noticed the garden in the back lot and on mentioning it to his father was told that his father had given the Defendants permission to put in a vegetable garden there. Around the last of August or the

first part of September, Jozsef observed from his yard what he positively believed to be marijuana growing in this garden. He reported it to his father and Mr. Gitta told him that it was none of their business and it would be better if he did not go back there. As the marijuana began to ripen, the fact that this unlawful activity was being conducted on his family's property worried Jozsef to the point that he went to the garden and plucked a leaf from one of the marijuana plants hanging over the fence (the plants at this point were then eight to ten feet high) and took it to Cpl. Marshall, a friend of his on the Easton Police Force, as proof of his previous statement to Marshall that the Defendants were growing marijuana on his parents' property. Marshall examined the specimen and agreed that it was a marijuana leaf and then took it to Det. Sgt. Duncan of the Maryland State Police, who also agreed that it was a leaf from a marijuana plant.

The day after he took the leaf, he noted that he could not see the marijuana through the fence that divided the back lot from the front lot and, on going back to the garden to investigate, he discovered that the marijuana had been cut about an inch or an inch and a half above the ground and removed from open view. He then went over to the barn, which was wide open as always, looked in and saw some of it protruding through the entrance of the loft. He climbed up to the loft and found it jammed full of marijuana plants hanging in bunches from the rafters. However, these plants had roots on them and appeared too wilted to have been recently cut, so he concluded that they had come from somewhere else.

After reporting this discovery to his friend Marshall, he was contacted by Cpl. Edwin D. Horner, Jr., Regional Supervisor of the Narcotics Section of the Maryland State Police, at about 6:00 P.M. on September 22, 1975. As a result of this contact, Jozsef agreed to take Horner to the barn that evening. Upon arriving at the barn with Jozsef, Horner noted the marijuana protruding through the loft

opening and on going up into the loft found it to contain the marijuana plants hanging in bunches from the rafters just as Jozsef had previously told him.

After making these observations, Horner made a written application for and obtained subject Search and Seizure Warrant from Judge James A. Wise. After obtaining the warrant, Horner, in company with another State Policeman, returned to the loft at about 8:00 A.M. on the morning of September 23 to await the arrival of the Defendants. Shortly after 1:00 P.M., the Defendants climbed up into the loft with certain paraphernalia used in manicuring and preparing the marijuana for market. Just as they were about to start to work on the marijuana, Conklin, in the course of looking for a bucket for Miss Perry to sit on, saw one of the officers hiding behind the marijuana plants hanging from the rafters. At this point, the officers placed the Defendants under arrest and, in due course, seized the contraband and paraphernalia.

To support their contention that the warrant and all evidence seized thereunder should be suppressed, the Defendants claim that they were given exclusive possession of the entire back lot and the barn in which the marijuana was found for the purpose of conducting their gardening operations and that, therefore, whenever Jozsef went on the back lot and in the barn and he and Horner went to the barn, they were government agents trespassing upon an area constitutionally protected by the Fourth Amendment to the Federal Constitution.

This argument is based on Conklin's testimony that the Defendant's right of user and possession covered the entire back lot and the barn and was exclusive to the point of even excluding Mr. Gitta from using or having access to his back lot. Either due to his friendship for the Defendants or out of fear of becoming criminally involved with them, or both, the testimony of Mr. Gitta to some extent supports that of Conklin as to the exclusivity of the right to user

and possession. However, Cpl. Horner testified that after he had arrested the Defendants and seized the contraband, he reported to Mr. Gitta what he had found on his property and what he had done in consequence thereof. Whereupon, Mr. Gitta told him that he had only given the Defendants the right to use any portion of the back lot for a garden and the right to use whatever route they might choose to go to and from it and went on to state that he had not given them any right to use any buildings, including the barn. Furthermore, Jozsef testified, and was not contradicted, that he had always been allowed to take anyone he chose over any part of his parents' property and, except for the hereinbefore mentioned fatherly admonition, this right had never been withdrawn. He also testified that as far as he knew, no other member of his family had ever been forbidden free access to the back lot. Indeed, it seems utterly fantastic under all the attendant circumstances to believe that the Defendants would expect, much less demand and receive from their benefactor, a right of user and possession of the entire back lot and barn that would not only exclude Mr. Gitta's family but Mr. Gitta himself from access to or the use thereof of any portion of the back lot not used by the Defendants for a garden.

While Conklin testified that the marijuana could not be seen growing in his garden unless one entered the back lot, we simply find his testimony incredible and choose to believe that of Jozsef and his father. Jozsef said it could be easily spotted through the fences by anyone standing outside the Gitta property and that he had spotted it from a point outside of the back lot before his father had advised him that he should stay away from the garden as it belonged to Conklin and was none of their business. Mr. Gitta was finally forced to concede on cross-examination that even he could vaguely see the garden from outside the back lot.

Jozsef further testified that he had gone to the barn on a number of occasions during that summer and had

never been told by his father that he couldn't go to the barn whenever it suited him.

In short, after carefully observing all of the witnesses that testified at the suppression hearings and evaluating their credibility, the Court finds that it cannot in good conscience believe any of the testimony that was adduced to show that the Defendants had any more than a mere license, revokable at the will of the licensor, to plant, cultivate and harvest a vegetable garden containing only vegetables and plants that were lawful to grow at the spot picked out by the Defendants and free access thereto for those purposes and no other. We find that they had no other rights in the back lot or the buildings thereon, including the barn; and further find that Mr. Gitta and every member of his family and their invitees had a perfect right to go through any part of the back lot, including the barn, except that part that had been fenced in by Conklin for his garden. Lastly, we find that Mr. Gitta's admonition to Jozsef was no more than fatherly advice to keep out of other people's business and not to go into the garden itself, and cannot, and certainly should not, be construed as an unconditional command not to enter the barn or any part thereof.

STANDING

Since the crimes with which the Defendants were charged involve the possession of property, the mere possession of which is a crime, the Defendants have automatic standing to challenge the admissibility of the evidence seized under subject Search Warrant. *Cecil Jones v. United States*, 362 U.S. 257; 4 L. Ed. 2d 697 (1960); *Anderson v. State*, 9 Md. App. 532 (1970).

APPLICABILITY OF THE FOURTH AMENDMENT

By no stretch of the imagination can it be said that the Defendants were protected by the Fourth Amendment to the Federal Constitution from any evidence or information gathered through Jozsef's observations of the marijuana in the garden and his so-called intrusion when he took a leaf from one of the marijuana plants, for the Fourth Amendment does not extend to open fields and this garden was certainly growing in an open field. *Hester v. United States,* 265 U.S. 57; 68 L. Ed. 898; *Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corporation,* 416 U.S. 861; 40 L. Ed. 2d 607. Therefore, regardless of whether or not Jozsef is held to be a police agent, the protection afforded the Defendants by the Fourth Amendment could not apply to the discoveries he made prior to entering the barn and we believe and hold that these discoveries in and of themselves afforded sufficient probable cause to justify the issuance of a good and valid search warrant for the back lot and all the improvements thereon including the barn, and thus constituted an independent source of probable cause free from any taint of illegality.

Before proceeding any further, we must determine whether or not Jozsef was a police agent. Based on the facts as we have found them, we hold that Jozsef was never a law enforcement officer any more than some girl who answers a switchboard at a precinct station is a policeman. Furthermore, he initiated and conducted this investigation on his own and no law enforcement agency took any interest in it until September 22, 1975 when Cpl. Horner contacted Jozsef. Whether Cpl. Horner asked Jozsef to take him to the barn or Jozsef suggested that he go with him to the barn is not clear from the record, but really does not matter, since in either case Jozsef played the role of host and Horner the role of an invited guest, so Jozsef was not converted by this contact with Horner into an agent for the police. Therefore, we hold that Jozsef was not a police

officer or an agent of any law enforcement agency. Since the Fourth Amendment only protects a citizen against the conduct of government agents, it cannot be extended to protect the Defendants from the activities of Jozsef Gitta, Jr. Therefore, Jozsef's search of the barn and discovery of the marijuana hanging in the loft thereof provided an independent source for ample probable cause to justify the issuance of a valid search warrant that would authorize the police to search said barn and seize whatever contraband they found therein. This source of probable cause is also free from the taint of any illegality.

For the sake of argument, even if we had found that Jozsef was a police agent, since we have already found as a fact that Jozsef was authorized and permitted to go into any part of the barn or to take anyone with him into any part of the barn by the lawful owners thereof and that he did invite Cpl. Horner to accompany him to the barn, we find that no trespass was ever committed by Jozsef or Cpl. Horner in searching the barn and discovering the marijuana therein. By way of dicta, we further hold that the accused had no right whatsoever to be in the barn, much less store their contraband therein, and, therefore, had no reasonable expectation to be free from governmental intrusion.

For these reasons, we hold that the facts in this case are clearly distinguishable from and inapposite to the facts in the recent case of *Garrison v. State,* 28 Md. App. 257, where the police were trepassing in the course of their search for probable cause, and require a result opposite to that reached in Garrison.

Finally, after carefully examining the Search Warrant and the Application therefor, we found both to be in order and valid on their face. The Application simply abounds with probable cause and both the Application and the Warrant meet all constitutional and statutory requirements.

For the above reasons, we overrule the Motion to Suppress, having found that the Defendants' contention that the obtention of probable cause was tainted by the illegal conduct of the police to be entirely without merit.

/s/ Harry E. Clark,
Judge

True Copy, Test:
Earl H. Pinder, Clerk
By /s/ Carolyn Will
Deputy Clerk
